

61679-0

RECEIVED  
NOV 10 2008  
COURT 1103

NOV 12 PM 2:20

NO. 61679-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

83277-3

CITY OF SEATTLE,

Appellant,

v.

THE HON. GEORGE W. HOLIFIELD,  
MATTHEW JACOB,  
JACOB CULLEY

Respondents.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2008 NOV 10 PM 4:54

ON APPEAL FROM THE SEATTLE MUNICIPAL COURT  
The Honorable Judge George W. Holifield  
And  
ON APPEAL FROM THE KING COUNTY SUPERIOR COURT  
The Honorable Judge Cheryl Carey

**BRIEF OF RESPONDENT MATTHEW JACOB**

Andrew Elliott, WSBA #35106  
Joshua S. Schaer, WSBA #31491  
Attorneys for Respondent Matthew Jacob

The Law Offices of James Egan, PLLC  
605 First Ave., Suite 400  
Seattle, Washington 98104  
(206) 749-0333

**ORIGINAL**

## TABLE OF CONTENTS

I.	<u>STATEMENT OF THE CASE</u>	1
II.	<u>ARGUMENT IN RESPONSE TO APPELLANT'S BRIEF</u>	2
A.	<u>Requirements for a Writ of Review.</u>	2
B.	<u>The First Prong of RCW 7.16.040 Requires a Patently Erroneous Decision Amounting to Jurisdictional Excess or Illegality.</u>	3
1.	<u>Standard of Review for Denial of Writ Application.</u>	3
2.	<u>The Test is Whether the Trial Court's Decision Amounted to Jurisdictional Excess or an Illegal Act.</u>	4
3.	<u>The Lower Court Did Not Act in Excess of its Jurisdiction or Illegally in Interpreting CrRLJ 8.3(b).</u>	8
C.	<u>The Second Prong of RCW 7.16.040 Requires That Neither an Appeal Nor an Adequate Remedy at Law Is Available.</u>	9
1.	<u>The Appellant's Limited Remedies Do Not Change the Requirements for a Writ.</u>	9
2.	<u>The Appellant Failed to Seek a RALJ 2.2 Ruling.</u>	10
3.	<u>The Appellant Has Other Remedies, If They Can be Discerned on This Record.</u>	12
D.	<u>Suppression is a Proper Remedy Under CrRLJ 8.3(b).</u>	14
1.	<u>Standard of Review for Analysis of Evidence Suppression.</u>	14

2.	<u>Application of CrRLJ 8.3(b).</u>	15
3.	<u>CrRLJ 8.3(b) Requires a Remedy.</u>	15
4.	<u>Case Law Supports Suppression Under CrRLJ 8.3(b).</u>	17
5.	<u>Suppression is The Least Drastic Remedy Under CrRLJ 8.3(b).</u>	19
6.	<u>The Alternative to Suppression Under the Rule is Dismissal.</u>	20
III.	<u>CONCLUSION</u>	20

## TABLES OF AUTHORITIES

### Table of Cases

<i>Arizona v. Maypenny</i> , 451 U.S. 233, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981)	9
<i>Berschaer/Phillips Construction Co. v. Seattle School Dist. No. 1</i> , 124 Wn.2d 815, 881 P.2d 896 (1994)	7
<i>Bridle Trails Community Club v. Bellevue</i> , 45 Wn.App. 248, 724 P.2d 1110 (1986)	3
<i>Bushman v. New Holland Div. of Sperry Rand Corp.</i> , 83 Wn.2d 429, 518 P.2d 1078 (1974)	4
<i>Cannon v. D.O.L.</i> , 147 Wn.2d 41, 50 P.3d 627 (2002)	13
<i>City of Mount Vernon v. Mount Vernon Municipal Court</i> , 93 Wn.App. 501, 973 P.2d 3 (1998)	7, 12
<i>City of Seattle v. Allison</i> , 148 Wn.2d 75, 59 P.3d 85 (2002)	13

<i>City of Seattle v. Clark-Munoz</i> , 152 Wn.2d 39, 93 P.3d 141 (2004)	13
<i>City of Seattle v. Keene</i> , 108 Wn.App. 630, 31 P.3d 1234, <i>amended on denial of reconsideration</i> (2001)	2, 4, 5, 12
<i>City of Seattle v. Orwick</i> , 113 Wn.2d 823, 784 P.2d 161 (1989)	17, passim
<i>City of Seattle v. Williams</i> , 101 Wn.2d 445, 680 P.2d 1051 (1984)	4, passim
<i>City of Spokane v. Kruger</i> , 116 Wn.2d 135, 803 P.2d 305 (1991)	16, 18, passim
<i>Commanda v. Cary</i> , 143 Wn.2d 651, 23 P.3d 1086 (2001)	2, 5, 6, 11, passim
<i>Development Services of America v. Seattle</i> , 138 Wn.2d 107, 979 P.2d 387 (1999)	3
<i>Maehren v. City of Seattle</i> , 92 Wn.2d 480, 599 P.2d 1255 (1979)	8
<i>Odegaard v. Everett Sch. Dist. No. 2</i> , 55 Wn.App. 685, 780 P.2d 260 (1989)	2
<i>State v. A.M.R.</i> , 147 Wn.2d 91, 51 P.3d 790 (2002)	9
<i>State v. Baker</i> , 56 Wn.2d 846, 355 P.2d 806 (1960)	13
<i>State v. Brayman</i> , 110 Wn.2d 183, 751 P.2d 294 (1988)	13
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995), <i>cert. denied</i> , 516 U.S. 1121 (1996)	14
<i>State v. Busig</i> , 119 Wn.App. 381, 81 P.3d 143 (2003)	18, 19
<i>State v. Campbell</i> , 85 Wn.2d 199, 532 P.2d 618 (1975)	10, 11
<i>State v. Castellanos</i> , 132 Wn.2d 94, 935 P.2d 1353 (1997)	8

<i>State v. Epler</i> , 93 Wn.App. 520, 969 P.2d 498 (1999)	4, passim
<i>State v. Garza</i> , 99 Wn.App. 291, 994 P.2d 868 (2000)	18
<i>State v. Glasser</i> , 37 Wn.App. 131, 678 P.2d 827 (1984), <i>review denied</i> , 102 Wn.2d 1008 (1984)	6, 7
<i>State v. Hanna</i> , 123 Wn.2d 704, 871 P.2d 135, <i>cert. denied</i> , 513 U.S. 919 (1984)	15
<i>State v. Harris</i> , 2 Wn.App. 272, 469 P.2d 937 (1970)	6
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994)	14
<i>State v. Huelett</i> , 92 Wn.2d 967, 603 P.2d 1258 (1979)	8
<i>State v. Luvene</i> , 127 Wn.2d 690, 903 P.2d 960 (1995)	14
<i>State v. Marks</i> , 114 Wn.2d 724, 790 P.2d 138 (1990)	18, passim
<i>State v. McReynolds</i> , 104 Wn.App. 560, 17 P.3d 608 (2000)	18
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997)	14
<i>State v. Miller</i> , 82 Wash. 477, 144 P.2d 693 (1914)	10
<i>State v. Reinhart</i> , 77 Wn.App. 454, 891 P.2d 735 (1995)	7
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	8
<i>State v. Whitney</i> , 69 Wn.2d 256, 418 P.2d 143 (1966)	3, 4
<i>State v. Wittenbarger</i> , 124 Wn.2d 467, 880 P.2d 517 (1994)	13
<i>State ex. rel. Gebinini v. Wright</i> , 43 Wn.2d 829, 264 P.2d 1091 (1953)	2, 4
<i>State ex rel. Wilson v. Kay</i> , 164 Wn. 685, 4 P.2d 698 (1931)	9

*Sunderland Family Treatment Servs. V. City of Pasco*,  
127 Wn.2d 782, 903 P.2d 986 (1995) 3

*United States v. Morrison*, 449 U.S. 361, 101 S.Ct. 665,  
66 L.Ed.2d 564, *rehearing denied*, 450 U.S. 960 (1981) 18

#### Statutes and Codes

RCW 7.16.040 2, *passim*

RCW 7.16.120 3

RCW 46.61.506 13

#### Court Rules

RALJ 2.2 10, 11, *passim*

CrRLJ 8.3(b) 14, 16, *passim*

I. STATEMENT OF THE CASE.

On March 11, 2008, in *City of Seattle v. Roger Kennedy*, the Hon. Judge George W. Holifield found numerous errors at the State Toxicology Lab that called into question the quality of its work.<sup>1</sup> The trial court was unable to rely on Toxicology Lab witnesses' testimony for the government to establish foundational admissibility for its breath test evidence.<sup>2</sup> The court further found that reliance on witnesses that committed "the worst kind of governmental misconduct imaginable" would eviscerate the defendant's right to a fair trial.<sup>3</sup>

The *Kennedy* ruling was applied to breath test evidence that the Appellant, City of Seattle, sought to introduce against Respondent Matthew Jacob. The City of Seattle did not seek a RALJ 2.2 ruling terminating the prosecution; rather, it petitioned for a writ of certiorari in King County Superior Court. On April 25, 2008, the Hon. Judge Cheryl Carey denied the writ petition.<sup>4</sup>

This Court then granted the City of Seattle's motion for discretionary review of the denied writ petition and the trial court's use of CrRLJ 8.3(b) to suppress evidence.

---

<sup>1</sup> See Appendix 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> CP 45.

## II. ARGUMENT IN RESPONSE TO APPELLANT'S BRIEF

### A. Requirements for a Writ of Review.

The Superior Court was correct to deny the City of Seattle's petition for a writ. Washington Courts have long held that "[t]he statutory writ of certiorari is an *extraordinary remedy*," and the test for issuance is stringent.<sup>5</sup> The Supreme Court has stated: "[a]lthough the writ may be convenient, no authority supports its use as a matter of expediency."<sup>6</sup> A writ will not be granted unless:

(1) the... court exceeded its jurisdiction or acted illegally; *and* (2) there is no appeal or adequate remedy at law.<sup>7</sup>

The two predicates operate independently. The writ will not issue unless both elements are satisfied.<sup>8</sup>

In *Bridle Trails Community Club v. City of Bellevue*, this Court explained that a statutory writ requires satisfaction of all factors in RCW 7.16.040:

[t]he statute requires the superior court to grant the writ only when all four factors are present, and accords the petitioner full review of the issue raised. If any of the factors are absent, there is no

---

<sup>5</sup> *Odegaard v. Everett Sch. Dist. No. 2*, 55 Wn. App. 685, 687, 780 P.2d 260 (1989), citing *State ex rel. Gebenini v. Wright*, 43 Wn.2d 829, 830, 264 P.2d 1091 (1953). [Emphasis added.]

<sup>6</sup> *Commanda v. Cary*, 143 Wn.2d 651, 656, 23 P.3d 1086 (2001).

<sup>7</sup> RCW 7.16.040. [Emphasis added.] See also *Commanda v. Cary*, *supra.* at 657; *City of Seattle v. Keene*, 108 Wn.App. 630, 644-45, 31 P.3d 1234 (2001).

<sup>8</sup> See *Commanda*, 143 Wn.2d at 655.

jurisdiction for review. The common law writ embodied in the constitution contains no such imperatives....<sup>9</sup>

Likewise, in *State v. Whitney*, after finding “the legislature may not deprive the court of its constitutional power of review,” the State Supreme Court then considered whether the statutory writ met all necessary criteria.<sup>10</sup>

B. The First Prong of RCW 7.16.040 Requires a Patently Erroneous Decision Amounting to Jurisdictional Excess or Illegality.

1. Standard of Review for Denial of Writ Application.

The Appellant argues that the Superior Court found “clear legal error,” but still denied the writ.<sup>11</sup> Thus, the Appellant does not address this threshold prong of the statutory writ test.

This Court should analyze the legal issues in the writ denial under a *de novo* standard, but with a highly deferential standard to the prevailing party regarding factual determinations.<sup>12</sup> Since the underlying factual

---

<sup>9</sup> 45 Wn.App. 248, 724 P.2d 1110 (1986).

<sup>10</sup> 69 Wn.2d 256, 418 P.2d 143 (1966).

<sup>11</sup> Brief of Appellant at 3. [The writ decision is subject to ambiguity; it is probable that a mere typographical error created the impression that “clear legal error” existed, because Judge Carey had previously denied a similar City writ application challenging an alternative ground for suppression, finding no legal error or lack of adequate remedies. Regardless of the specific written ruling, however, it was proper to deny the writ.]

<sup>12</sup> *Development Services of America v. Seattle*, 138 Wn.2d 107, 979 P.2d 387 (1999), citing *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995); see also RCW 7.16.120.

assertions are verities in this appeal, the question of “clear legal error” is subject to *de novo* review.

2. The Test is Whether the Trial Court’s Decision Amounted to Jurisdictional Excess or an Illegal Act.

The Appellant refers to this Court’s decision in *Seattle v. Keene*, and approval of the holding in *Bushman v. New Holland*.<sup>13</sup> Indeed, this Court stated that, “the circumstances here are governed not by [*State v.*] *Epler*, but by [*Seattle v.*] *Williams* and *Bushman*.”<sup>14</sup> The *Bushman* ruling quotes from *State ex rel. Gebinini v. Wright*:

[t]he issuance of a writ of certiorari is to some extent discretionary. The reviewing court must retain a measure of latitude in deciding whether to grant certiorari in a particular case.<sup>15</sup>

The *Bushman* Court continued its analysis by approving of the test in *State v. Whitney*, namely:

[t]o determine whether to grant the writ: whether the alleged error is likely to recur, and whether it involves a ‘patently erroneous construction of a statute’ by which the prosecution has been deprived of an accepted, useful, and reliable means of proof.<sup>16</sup>

In *Whitney*, the trial court clearly ruled contrary to RCW 72.50.010 et seq., and consequently acted in an illegal manner.

---

<sup>13</sup> *City of Seattle v. Keene*, 108 Wn.App. 630, 644-45, 31 P.3d 1234 (2001), citing *Bushman*, 83 Wn.2d 429, 518 P.2d 1078 (1974).

<sup>14</sup> *Id.*, citing *Epler*, 93 Wn.App. 520, 969 P.2d 498 (1999); *Williams*, 101 Wn.2d 445, 680 P.2d 1051 (1984); *Bushman*, *supra*.

<sup>15</sup> 43 Wn.2d 829, 264 P.2d 1091 (1953).

<sup>16</sup> *Keene*, *supra.*, citing *Bushman*, 83 Wn.2d 429, 518 P.2d 1078 (1974); *State v. Whitney*, 69 Wn.2d 256, 260-61, 418 P.2d 143 (1966).

Since *Bushman* expressly adopts the reasoning in *Whitney*, it logically follows that *Keene* also approves the “patently erroneous construction” standard used in *Whitney* to satisfy the first prong test.<sup>17</sup>

The definition of a “patently erroneous construction,” however, is more than a merely incorrect ruling. RCW 7.16.040 requires a lower court to act either in excess of “its jurisdiction” or “illegally.” In *Commanda v. Cary*, the Supreme Court referred to *State v. Epler*:

[t]he threshold question for a discretionary writ is not whether the district court committed error of law, but whether the court had jurisdiction to decide the motion.<sup>18</sup>

While this Court, in *Keene*, refers to the statement in *Commanda* as dicta, the analysis that “patent error” equates to “jurisdictional excess” or “illegality” is the only interpretation that matches both the statutory language and case law precedent.

*Commanda* finds that “a merely erroneous ruling is not an act in excess of the court’s jurisdiction.”<sup>19</sup> The Supreme Court declined the invitation to expand the scope of the writ to encompass alleged errors of law regarding the elements of the crime, stating:

---

<sup>17</sup> See *Keene*, 108 Wn.App. at 641.

<sup>18</sup> *Commanda v. Cary*, 143 Wn.2d 651, 23 P.3d 1086 (2001), citing *State v. Epler*, 93 Wn. App. 520, 523, 969 P.2d 498 (1999).

<sup>19</sup> *Commanda v. Cary*, 143 Wn.2d 651, 23 P.3d 1086 (2001), citing *Epler*, *supra*.

[s]uch a holding would broaden the scope of the statutory writ so as to be generally available rather than to be an extraordinary remedy as consistently held.<sup>20</sup>

If the moving party can show that the lower court acted in a manner so patently erroneous that it essentially exceeded its jurisdiction or issued a completely illegal ruling, then a writ may issue to correct a legal error. But the mere allegation of error in an evidentiary ruling is insufficient to meet the first prong of RCW 7.16.040.

In *State v. Harris*, Division Two held that a constitutional question may be raised on a writ of prohibition because, “if there is in fact double jeopardy the trial court is acting in excess of its jurisdiction in such instance.”<sup>21</sup> *Harris* accepted review to prevent a prosecution that was unquestionably barred under the law. *Harris* does not hold that a mere allegation of error in a lower court’s discretionary ruling equates to jurisdictional excess or illegality.

The Appellant’s citation to *State v. Glasser* supports a “jurisdictional excess” or “illegality” test for the first-prong analysis.<sup>22</sup> In *Glasser*, the defendant received a deferred prosecution after being

---

<sup>20</sup> *Commanda*, 143 Wn.2d at 656.

<sup>21</sup> 2 Wn.App. 272, 469 P.2d 937 (1970).

<sup>22</sup> Brief of Appellant at 7, citing *State v. Glasser*, 37 Wn.App. 131, 678 P.2d 827 (1984), review denied, 102 Wn.2d 1008 (1984).

convicted.<sup>23</sup> This result was completely barred under RCW 10.05, and the trial court acted outside its jurisdiction to order the deferred prosecution.<sup>24</sup>

The Appellant also cites *City of Mount Vernon v. Mount Vernon Municipal Court*, to assert that merely erroneous suppression is sufficient to support a writ.<sup>25</sup> But this Court, in *Mount Vernon*, never states an alleged mere error of law satisfies the jurisdictional excess test. Rather, this Court states that review of an existing superior court decision to grant the writ is subject to the considerations in RAP 2.3(d).<sup>26</sup> While the *Mount Vernon* opinion found “no tenable reason” to quash the writ, the holding does not provide an analysis of the prongs in RCW 7.16.040.<sup>27</sup> Therefore, *Mount Vernon*’s reasoning does not answer the first prong inquiry. Where a legal theory is not discussed in the opinion, that case is not controlling precedent in a case where the theory is properly litigated.<sup>28</sup>

If the Appellant is correct, then any alleged error in a discretionary interlocutory decision could give rise to a statutory writ, and thus make an extraordinary remedy into a commonplace form of review. This Court

---

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 132.

<sup>25</sup> 93 Wn.App. 501, 973 P.2d 3 (1998); Brief of Appellant at 8.

<sup>26</sup> 93 Wn.App. 508-509, citing *City of Seattle v. Williams*, *supra*.

<sup>27</sup> *Id.* at 509.

<sup>28</sup> *State v. Reinhart*, 77 Wn.App. 454, 459, 891 P.2d 735 (1995); *Berschaer/Phillips Construction Co. v. Seattle School Dist No. 1*, 124 Wn.2d 815, 824, 881 P.2d 896 (1994).

should not alter the jurisdictional excess or illegality standard established by a plain statutory reading and *stare decisis*.

3. The Lower Court Did Not Act in Excess of its Jurisdiction or Illegally in Interpreting CrRLJ 8.3(b).

Evidentiary decisions by a trial court are within its sound discretion, and such discretion is only abused when no reasonable person would adopt the same conclusions.<sup>29</sup> An appellate court will not overturn a ruling on evidence unless the findings are “manifestly unreasonable or based upon untenable grounds or reasons.”<sup>30</sup> The mere claim that a trial court made a wrong evidentiary decision is not the same as a “legally erroneous” ruling that exceeds jurisdiction or is illegal.

Here, the trial court appropriately exercised its discretion to find governmental misconduct that affected the Respondent’s right to a fair trial. The trial court relied on precedent that interprets CrRLJ 8.3(b). The trial court decision was proper and based on legal authority.

---

<sup>29</sup> *State v. Castellanos*, 132 Wn.2d 94, 935 P.2d 1353 (1997), citing *Maehren v. City of Seattle*, 92 Wn.2d 480, 599 P.2d 1255 (1979); *State v. Huelett*, 92 Wn.2d 967, 603 P.2d 1258 (1979).

<sup>30</sup> *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997).

C. The Second Prong of RCW 7.16.040 Requires That Neither an Appeal Nor an Adequate Remedy at Law is Available.

1. The Appellant's Limited Remedies Do Not Change the Requirements for a Writ.

Under *State ex rel. Wilson v. Kay*, a superior court's discretion to grant a writ derives from "its power to evaluate whether petitioner has an adequate remedy."<sup>31</sup> This is consistent with RCW 7.16.040's mandate that there must be "[n]o appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law." The available remedy need not be an appeal; rather, other adequate avenues may exist to bar issuance of an extraordinary writ.

The government's remedies after an adverse ruling have been historically strictly limited.<sup>32</sup> The United States has an "important tradition disfavoring criminal appeals by the sovereign."<sup>33</sup> The Washington Constitution grants criminal defendants the right to appeal, but gives no corresponding right to the State.<sup>34</sup>

RCW 7.16.040 makes no distinction between the government and the defendant in its requirements for issuance of a statutory writ. The two-prong test does not change simply because the RALJ offers a broader

---

<sup>31</sup> 164 Wn. 685, 4 P.2d 698 (1931).

<sup>32</sup> See Brief of Respondent/Cross-Appellant at 29-30.

<sup>33</sup> *Arizona v. Manypenny*, 451 U.S. 233, 244, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981); *State v. AMR*, 147 Wn.2d 91, 51 P.3d 790, 792 (2002).

appeal option for a defendant than it does for the government. RCW 7.16.040 must be interpreted on its face to require the absolute absence of other legal remedies before a writ may issue.

2. The Appellant Failed to Seek a RALJ 2.2 Ruling.

With respect to the statute's second prong, the Supreme Court has held that the government is not the arbiter of its right to appeal.<sup>35</sup> In *State v. Campbell*, the Court affirmed that the government could appeal suppression orders only where the prosecution was effectively abated. When determining whether the prosecution could go forward, the Court held:

[a] critical distinction must be drawn between a suppression order which, *in the mind of the State*, makes further prosecution unfeasible, and an order, which *clearly on its face*, supported by the record, effectively abates or otherwise determines the action. The latter deals with the impartial opinion of the trial judge, while the former is predicated merely on the opinion of the State, to which the defense and the trial court might well differ. We do not deviate from the rule that jurisdiction cannot be fashioned upon the resolution of conflict in expert opinions.<sup>36</sup>

Similarly, this court's jurisdiction to issue a writ of review cannot be derived solely from the Appellant's assertion that it has no appeal. RALJ 2.2 has delegated that decision to the trial judge.

---

<sup>34</sup> *State v. Miller*, 82 Wash. 477, 478, 144 P.2d 693 (1914).

<sup>35</sup> *State v. Campbell*, 85 Wn.2d 199, 201-02, 532 P.2d 618 (1975).

<sup>36</sup> *Campbell*, 85 Wn.2d at 619-20. [Emphasis in original.]

If the trial judge finds that a suppression order effectively terminates the case, then the government has an adequate remedy and there is no jurisdiction to issue a writ. Conversely, if the trial judge denies a RALJ 2.2 finding, then the government may pursue a writ on that ruling, or proceed to trial and secure a conviction. *Commanda* also addresses this issue, and the Supreme Court held that an adequate remedy via RALJ appeal is an option.<sup>37</sup>

The appropriate forum in which to litigate the government's right to appeal, or lack thereof, is the Seattle Municipal Court. Only that court has the authority to issue findings pursuant to RALJ 2.2(c)(2). Moreover, that court is familiar with the facts of this case and has vast experience in evaluating DUI prosecutions within its jurisdiction.

The court rules permit an adequate remedy at law when a RALJ 2.2(c)(2) order is entered; the Appellant, however, did not seek such an order. The Appellant does not address how its own failure to obtain a RALJ 2.2(c)(2) ruling should then create no available remedy. The Appellant cannot complain of having no redress with respect to an adverse interlocutory decision if it refuses to seek all available remedies.

---

<sup>37</sup> 143 Wn.2d at 657.

3. The Appellant Has Other Remedies, If They Can be Discerned on This Record.

While the Appellant dismisses the idea of a cross appeal as a “possibility,” this Court has previously considered the likelihood of a cross appeal as an adequate remedy.<sup>38</sup> In *Keene*, this Court could not assess the availability of an alternative adequate remedy.<sup>39</sup>

The *Keene* Court remanded the case for the lower court to determine whether the government had another remedy, finding that:

[t]he likelihood of an opportunity for cross appeal here cannot be discerned on this record, which does not allow us to evaluate the strength of the City's case on the alternate prong referenced by the court.... On this record, the availability of an adequate remedy other than the writ is unclear.<sup>40</sup>

Thus, the Appellant's claim that this Court should not consider the likelihood of a cross appeal is wrong.

The government's other plain, speedy, and adequate remedy is to go forward with its prosecution despite the suppressed evidence. Based on the long-held view that the government is not entitled to the same rights as

---

<sup>38</sup> *Keene*, 108 Wn.App. at 644-45. See also Brief of Appellant at 5.

<sup>39</sup> 108 Wn.App. at 645. [The *Mt. Vernon* decision is silent on whether the City of Mt. Vernon first sought, and was denied, a RALJ 2.2 finding; that case thus offers no precedential value on the second-prong test. See 93 Wn.App. 501, 973 P.2d 3 (1998).]

<sup>40</sup> *Keene*, 108 Wn.App. at 644-45. [This Court did not address the availability of any remedies other than a cross-appeal.]

a defendant, the Appellant has no legal basis to complain of inequity in seeking interlocutory review.<sup>41</sup>

RCW 46.61.506 provides multiple means of committing Driving Under the Influence.<sup>42</sup> The Legislature contemplated that, if the *per se* method of obtaining a conviction was impossible, a defendant could still be found guilty under the theory that he or she drove while “affected by” alcohol and/or drugs. Given the government’s difficulty in establishing strict compliance with breath test admissibility requirements, evidenced by decades of case law, the “affected by” prong allows for a prosecution to continue on the strength of other testimony.<sup>43</sup> Furthermore, nothing prevents the Appellant from negotiating a pre-trial resolution when evidence is suppressed; this practice is routine for most criminal cases.

---

<sup>41</sup> See Brief of Appellant at 6. [The criminal justice system is inherently designed against the government. Discovery rules order the government to disclose all evidence, while the Defense need not do so. The “beyond a reasonable doubt” standard, and presumption of innocence itself, creates “inequity” giving the Defense an “advantage,” but the government must abide by these rules.]

<sup>42</sup> [The statute reads: “(1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state: (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or (b) While the person is under the influence of or affected by intoxicating liquor or any drug; or (c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.”]

<sup>43</sup> See *Seattle v. Clark-Munoz*, 152 Wn.2d 39, 93 P.3d 141 (2004); *Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002); *Cannon v. D.O.L.*, 147 Wn.2d 41, 50 P.3d 627 (2002); *State v. Wittenbarger*, 124 Wn.2d 467, 880 P.2d 517 (1994); *State v. Brayman*, 110 Wn.2d 183, 751 P.2d 294 (1988); *State v. Baker*, 56 Wn.2d 846, 355 P.2d 806 (1960). [If the Appellant could not truly proceed under the “affected by” prong, then a RALJ 2.2 ruling would appear to be appropriate.]

In sum, the Appellant has other remedies that it either fails to address, or that cannot be ascertained on the record before this Court. This Court should uphold the denial of the writ application.

D. Suppression is a Proper Remedy Under CrRLJ 8.3(b).

1. Standard of Review for Analysis of Evidence Suppression.

Unchallenged findings of fact are verities on appeal.<sup>44</sup> Here, the trial court made 96 findings of fact outlining a pattern of gross governmental misconduct.<sup>45</sup> The Petitioner does not challenge any of those facts. All 96 facts are therefore considered verities in this case.

The trial court's decision based on these facts is subject to an abuse of discretion standard and should be afforded deference.<sup>46</sup> As the Supreme Court stated in *State v. Luvene*, "[t]he trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial."<sup>47</sup>

In *State v. Hanna*, the Supreme Court held that a trial court has wide latitude in granting or denying a motion to dismiss a criminal

---

<sup>44</sup> *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

<sup>45</sup> See Appendix 1.

<sup>46</sup> See *State v. Brett*, 126 Wn.2d 136, 198-99, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). See also *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997).

<sup>47</sup> 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

prosecution for discovery violations.<sup>48</sup> Certainly then, violations involving perjury, malfeasance, and gross misconduct should also allow a trial court to possess substantial discretion in crafting a remedy.

2. Application of CrRLJ 8.3(b).

For CrRLJ 8.3(b) to apply, two factors must be satisfied. First, there must be governmental misconduct. Second, that misconduct must give rise to prejudice affecting the defendant's rights to a fair trial. Given the factual verities in this case, there is no question before this Court as to whether CrRLJ 8.3(b) applies.

The only substantive question before this Court is what remedy should be applied under that rule. Case law supports suppression as a remedy. Between the two possible remedies, suppression and dismissal, established legal reasoning supports suppression as the less drastic alternative.

3. CrRLJ 8.3(b) Requires a Remedy.

There is clear governmental misconduct in this case, and that misconduct prejudiced the Respondent's right to a fair trial. The government misconduct in this case was committed in preparing evidence for trial. The trial court found that the government's witnesses were so

---

<sup>48</sup> 123 Wn.2d 704, 715, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994).

untrustworthy, by virtue of false and misleading actions, that to use their evidence would prejudice the Respondent.<sup>49</sup> This conclusion is based entirely on the trial judge's viewing of the facts.

The ultimate evidence that the misconduct applies to is a breath test. Given the fact that a breath test above .08 g/mL makes a defendant *per se* guilty of Driving Under the Influence, introduction of breath test evidence tainted by governmental misconduct would invariably prejudice the Respondent due to the strict liability nature of the alleged crime.<sup>50</sup>

Given that there was uncontested governmental misconduct which prejudices the Respondent, CrRLJ 8.3(b) applies. The remaining question therefore concerns the proper remedy for the misconduct. Certainly, one must exist to cure the prejudice. The plain language of CrRLJ 8.3(b) contemplates dismissal, and the Respondent concedes that dismissal is an available remedy under the rule.<sup>51</sup>

---

<sup>49</sup> See Appendix 1 [Unchallenged Findings of Fact 1-96, Conclusions of Law.]

<sup>50</sup> See *State v. Kruger*, 116 Wn.2d 135, 803 P.2d 305 (1991). [“[s]uppression of any evidence acquired after a violation will serve as an effective deterrent to police misconduct. Because a Breathalyzer reading of 0.10 is conclusive proof of guilt in a DWI charge, police will want to ensure that the results of any Breathalyzer tests they administer will be admissible will be admissible against the defendant.”]

<sup>51</sup> CrRLJ 8.3(b) states: “On Motion of Court. The court, in the furtherance of justice after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.”

Case law also indicates, however, that suppression is an available remedy. Appellate decisions provide that suppression is the appropriate remedy when removal of evidence would cure the prejudice caused by the governmental misconduct. Such is the case here.

Because this case involves government misconduct resulting in prejudice to a criminal defendant, standard notions of due process require some remedy. The government cannot simply be allowed to prejudice a criminal defendant through introducing evidence of *per se* guilt that is predicated on gross misconduct. The question before this Court is whether or not CrRLJ 8.3(b) allows for suppression as a remedy.

4. Case Law Supports Suppression Under CrRLJ 8.3(b).

In *Seattle v. Orwick*, the Supreme Court laid out the general principal that suppression is the favored remedy over dismissal.<sup>52</sup> The Court articulated that, “dismissal is... unwarranted in cases where suppression of evidence may eliminate whatever prejudice is caused [by the government].”<sup>53</sup>

The Petitioner properly notes that *Orwick* deals with a defendant’s right to counsel.<sup>54</sup> The Petitioner suggests that because *Orwick* does not

---

<sup>52</sup> 113 Wn.2d 823, 784 P.2d 161 (1989).

<sup>53</sup> *Id.* at 831.

<sup>54</sup> Brief of Appellant at 10.

deal directly with CrRLJ 8.3(b) it is inappropriately applied to this case.<sup>55</sup>

This argument fails, however, in light of Supreme Court precedent in *State v. Marks*<sup>56</sup> and *Spokane v. Kruger*.<sup>57</sup>

*Markss* and *Kruger* apply the general principle articulated in *Orwick* directly to CrRLJ 8.3(b). In both cases, the Court quotes from *Orwick* that “dismissal is not justified when suppression of evidence will eliminate whatever prejudice is cause by the action or misconduct.”<sup>58</sup> Suppression of tainted evidence denies the government the “fruits of its transgression.”<sup>59</sup>

Although it is true that *Orwick* does not deal directly with CrRLJ 8.3(b), *Marks* and *Kruger* attach the *Orwick* analysis to that rule. Reading all these cases together, suppression is an available remedy under CrRLJ 8.3(b).

The remedy of suppression under CrRLJ 8.3(b) is reaffirmed in *State v. Busig*.<sup>60</sup> There, in analyzing the ramifications of an officer’s failure to include information in an affidavit, Division Three states

---

<sup>55</sup> *Id.*

<sup>56</sup> 114 Wn.2d 724, 790 P.2d 138 (1990).

<sup>57</sup> 116 Wn.2d 135, 803 P.2d 305 (1991). *See also State v. McReynolds*, 104 Wn.App. 560, 17 P.3d 608 (2000); *State v. Garza*, 99 Wn. App. 291, 994 P.2d 868 (2000). [In *McReynolds* and *Garza*, Division Three also approves of the *Orwick* analysis with respect to CrRLJ 8.3(b).]

<sup>58</sup> *See Marks*, *supra.* at 730; *Kruger*, *supra.* at 145, *citing Orwick*, *supra.* at 831.

<sup>59</sup> *Marks*, *supra.* at 730, *citing United States v. Morrison*, 449 U.S. 361, 366, 101 S.Ct. 665, 66 L.Ed.2d 564, *rehearing denied*, 450 U.S. 960 (1981).

“neither dismissal nor suppression of the evidence under CrR 8.3(b) was justified.”<sup>61</sup>

The implication of the Court’s statement is clear; suppression is an alternative to dismissal when governmental misconduct occurs. The Petitioner argues that the statement in *Busig* is dicta. But considering *Marks*, *Kruger*, and *Orwick* together, the statement in *Busig* is not a new articulation of law for which a designation of dicta has legal significance. Rather, the statement in *Busig* simply recognizes a previously settled legal principle. Suppression is a remedy under CrRLJ 8.3(b).

5. Suppression Is The Least Drastic Remedy Under CrRLJ 8.3(b).

In the case at hand, the governmental misconduct deals directly with a breath test. Introducing the breath test to establish guilt would prejudice the Respondent’s right to a fair trial. Due to the nexus between the government’s misconduct and the prejudice to the Respondent, CrRLJ 8.3(b) applies.

Under the principles set forth in case law, the breath test should be suppressed under CrRLJ 8.3(b). By removing the breath test, the prejudice to the Respondent was eliminated. The trial court here used a precise scalpel to remove the tainted evidence, rather than employing a

---

<sup>60</sup> 119 Wn.App. 381, 81 P.3d 143 (2003).

<sup>61</sup> *Id.* at 390.

blunt hammer to dismiss the entire prosecution. As articulated in *Orwick*, *Marks*, and *Kruger*, where suppression will cure the prejudice, it is preferred over dismissal.

6. The Alternative to Suppression Under the Rule is Dismissal.

The issue before this Court is whether or not suppression is an available remedy under CrRLJ 8.3(b). If, as the Appellant argues, suppression is not a proper remedy, CrRLJ 8.3(b) still applies. There is no dispute as to whether dismissal is available under that rule. The trial court properly found, in its discretion, that governmental misconduct affected the Respondent's right to a fair trial. Therefore, even if the Petitioner's argument prevails, this case should be remanded for dismissal.

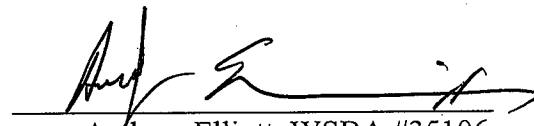
III. CONCLUSION

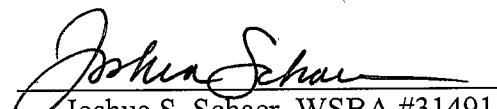
Established case law dictates that a writ of certiorari is only proper when the trial court's decision amounts to jurisdictional excess or illegal action, and the petitioner has no available legal remedies. The government seeks to turn an extraordinary remedy into ordinary review. Neither prong of RCW 7.16.040 was satisfied in this case; consequently, this Court should uphold the denial of the Appellant's writ petition.

CrRLJ 8.3(b) provides for both dismissal of a case and suppression of evidence when governmental misconduct that prejudices a defendant

occurs. The governmental misconduct and its effect on the Respondent is an unchallenged factual finding on appeal. The trial court properly used its discretion to suppress evidence and remove the taint of misconduct, instead of dismissing the case. Therefore, this Court should uphold Judge Holifield's decision to suppress breath test evidence predicated on errors, false swearing, and untrustworthy practices, under CrRLJ 8.3(b).

Respectfully submitted this 10<sup>th</sup> day of November, 2008.

  
Andrew Elliott, WSBA #35106

  
Joshua S. Schaer, WSBA #31491

Attorneys for Respondent Matthew Jacob

## APPENDIX 1

1  
2  
3  
4  
5  
6 IN THE SEATTLE MUNICIPAL COURT  
7 KING COUNTY, STATE OF WASHINGTON

8 CITY OF SEATTLE,

9 Plaintiff,

10 vs.

11 ROGER C. KENNEDY,

12 Defendant.

NO. 496912

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER GRANTING  
DEFENDANT'S MOTION TO  
SUPPRESS BAC TEST RESULTS

13 INTRODUCTION

14 Pursuant to CrRLJ 8.3(b) the defendants moved the court for an order dismissing their  
15 cases, or in the alternative suppressing the results of their breath tests. The court hereby makes  
16 the following findings of fact and conclusions of law in support of its order denying the  
17 defendants' motion to dismiss and granting the defendants' motion to suppress the results of the  
18 defendants' breath tests.

19 FINDINGS OF FACT

- 20 1. Dr. Barry K. Logan ("BKL") was appointed State Toxicologist in July 1990.  
21 2. BKL was appointed as Director of the Washington State Patrol's Forensic  
22 Laboratory Services Bureau in July 1999.  
23 3. In July 1999 the Washington State Toxicology Laboratory ("Tox Lab") became part

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER  
GRANTING DEFENDANT'S MOTION TO SUPPRESS BAC  
TEST RESULTS - 1

**FOX BOWMAN & DUARTE**  
Attorneys at Law  
1621-114th Ave. S.E. Suite 210  
Bellevue, Washington 98004  
(425) 451-1995

of the Washington State Patrol.

4. Ann Marie Gordon ("AMG") was hired by the Tox Lab in 1998.
5. AMG became the manager of the Tox Lab in 2000.
6. One function of the Tox Lab is to prepare and certify simulator external standard solutions used in the administration of the Washington State Patrol breath testing program.
7. Simulator external standard solutions are water and ethanol mixtures formulated to provide a standard ethanol vapor concentration when used in a breath alcohol simulator at 34 + or - 0.2 degrees Centigrade, of between 0.072 and 0.088 grams of ethanol per 210 liters of air, inclusive.
8. To allow for depletion of alcohol from the solution during its use, the target starting concentration is 0.082 g/210L.
9. Simulator external standard solutions are used as controls during the administration of a breath test to ensure the BAC DataMaster, or BAC DataMaster CDM, is operating correctly.
10. A properly administered breath test consists of a blank test, the verification of an internal standard, a subject sample, a blank test, a test of an external standard simulator solution, a blank test, a subject sample and a blank sample..
11. A properly administered breath test can yield an accurate and reliable measure of a person's breath alcohol concentration ("BAC").
12. The testing of a simulator external standard solution is an essential requirement of a properly administered breath test.
13. These simulator external standard solutions are prepared and certified in accordance with BKL's "procedure for the preparation of 0.08 simulator external standard solution for use with a breath test instrument."
14. This procedure for the preparation of the 0.08 simulator external standard solutions for use with a breath test instrument was promulgated by BKL as directed by RCW 46.61.506(3).
15. Exhibits 3, 4, 5, & 6, which were admitted in the Skagit County proceeding and stipulated to in this proceeding, are copies of the procedure for the preparation of 0.08 simulator external standard solutions.
16. A simulator external standard solution is not fit for use unless it meets all of the requirements promulgated by BKL.

- 1 17. The Tox Lab prepares and certifies up to forty or more simulator external standard  
2 solutions a year.
- 3 18. The certification of an simulator external standard solution requires the following:  
4 (1) An individual with a valid Blood Analyst Permit, authorized by the State  
5 Toxicologist, analyzes five separate aliquots of the simulator solution, by headspace  
6 gas chromatography; (2) Record the results of the testing in the solution certification  
7 database, including the date and the results of the contemporary external control; (3)  
8 A minimum of three analysts must certify the solution prior to its certification; (4)  
9 The average of the results from all of the analysts are computed (rounded to four  
10 decimal places). The standard deviation and relative standard deviation (CV) on all  
11 results are computed. (Freedman et al., 1978); (5) The solution is acceptable for use  
12 and therefore certified if it meets the following criteria. The average solution  
13 concentration must be between 0.098 and 0.108g/100mL inclusive. The CV must  
14 be 5% or less; (6) The reference vapor concentration is calculated by dividing the  
15 solution concentration by 1.23 and rounding to four decimal places; (7) A solution is  
16 valid for use for a period of one year following its preparation.
- 17 19. It is the custom and practice of the Tox Lab to have every available analyst certify  
18 each and every simulator external standard solution so the analyst can testify in  
19 court about the preparation and certification of the simulator external standard  
20 solution.
- 21 20. It is the custom and practice of the Tox Lab to have every analyst who certified a  
22 simulator external standard solution to sign a worksheet with the results of their  
23 analysis located thereon.
- 24 21. It is the custom and practice of the Tox Lab to have every analyst who certified a  
25 simulator external standard solution to sign a BAC Verifier DataMaster 0.08  
26 Simulator Solution Certification.
- 27 22. This certification, in part, says the signor personally examined and tested the  
28 solution in question.
- 29 23. This certification is signed under penalty of perjury.
- 30 24. AMG was the Tox Lab Manager but she was also an analyst.
- 31 25. Every analyst employed in the Tox Lab was aware of these customs and practices.
- 32 26. AMG was aware of these customs and practices.
- 33 27. BKL was aware of these customs and practices.
- 34 28. Every analyst in the Tox Lab knew that AMG was participating in the certification  
35 of the simulator external standard solutions because they saw her name on the

worksheets used to record the results of the testing of the simulator external standard solutions.

29. Every analyst in the Tox Lab knew, or had reason to know, that AMG was signing BAC Verifier DataMaster 0.08 Simulator Solution Certifications.
30. Sometime prior to becoming lab manager, AMG and BKL discussed the testing of simulator external standard solutions. This discussion arose because AMG told BKL that the former lab supervisor Dave Predmore did not do his own testing of simulator external standard solutions and she thought this was wrong.
31. During that discussion BKL told AMG that everyone would be required to conduct their own tests.
32. Sometime in 2003 Ed Formoso ("EF") became responsible for sending out simulator external standard solutions to breath test technicians for use in the WSP breath testing program.
33. EF noticed that it was difficult to send out simulator external standard solutions on a timely basis because AMG would take so long to certify the solutions.
34. Therefore, in 2003 EF started drawing and testing the five aliquots that were reportedly tested by AMG.
35. Beginning in 2003, AMG would sign the worksheet and sign the BAC Verifier DataMaster 0.08 Simulator Solution Certification.
36. Between February 5, 2004, and February 28, 2007, AMG signed forty-eight BAC Verifier DataMaster 0.08 Simulator Solution Certifications under penalty of perjury even though she did not test each of those solutions.
37. The clear and convincing evidence clearly shows that between February 5, 2004, and February 28, 2007, AMG signed BAC Verifier DataMaster 0.08 Simulator Solution Certifications, under penalty of perjury, which were false and misleading.
38. The clear and convincing evidence clearly shows that EF knew that AMG signed BAC Verifier DataMaster 0.08 Simulator Solution Certifications, under penalty of perjury, which were false and misleading.
39. The testimony of Estuardo Miranda ("EM") makes it clear that the fact that EF was testing simulator solutions for AMG was generally known in the Tox Lab.
40. EM testified that he knew of this for more than a year before he testified in Skagit County in October 2007.

- 1 41. Melissa Pemberton ("MP") testified that she knew this as far back as June 2005,  
2 when EF asked her to run AMG's samples him.
- 3 42. MP tested simulator solution batch number 05017 for EF and AMG.
- 4 43. MP knew that AMG did not test this solution and from that point on she knew, or  
5 had reason to know, that AMG was not testing the 0.08 simulator external standard  
6 solutions herself.
- 7 44. MP and EM knew, or had reason to know, that AMG was not testing 0.08 simulator  
8 external standard solutions herself.
- 9 45. MP and EM knew, or had reason to know, that AMG was signing BAC Verifier  
10 DataMaster 0.08 Simulator Solution Certifications, under penalty of perjury, which  
11 were false and misleading.
- 12 46. EM testified that it was generally know that AMG was not testing 0.08 simulator  
13 external standard solutions herself.
- 14 47. The evidence showed that all analysts employed by the Tox Lab knew that AMG  
15 would be signing BAC Verifier DataMaster 0.08 Simulator Solution Certifications,  
16 under penalty of perjury.
- 17 48. The evidence showed that for at least a year, and possibly longer, it was generally  
18 know, or should have been known, by the analysts employed in the Tox Lab that  
19 AMG signed BAC Verifier DataMaster 0.08 Simulator Solution Certifications,  
20 under penalty of perjury, which were false and misleading.
- 21 49. No analyst employed by the Tox Lab took any steps to terminate AMG's  
22 misconduct during this time.
- 23 50. Analysts employed by the Tox Lab continued to rely on the worksheets to testify in  
court even though it was generally known that AMG did not test the simulator  
external standard solutions.
51. The actions of AMG, EF, MP, BKL and the remaining analysts in the Tox Lab  
demonstrate a disregard for the truth and a propensity to mislead.
52. On Thursday, March 15, 2007, at approximately 4:59 pm, the Washington State  
Patrol received a "tip" that "simulator solutions are being falsified as far as the  
certification."
53. This "tip" was received by the office of the Chief of the WSP on March 16, 2007.
54. The "tip" was routed to BKL for investigation.
55. On or about March 22, 2007, this complaint was received by BKL's office.

- 1 56. Sometime in March 2007, BKL asked AMG to investigate this tip.
- 2 57. AMG and EF met sometime in March to decide how to investigate this matter.
- 3 58. When AMG and EF met, AMG told EF that AMG told BKL that EF was testing
- 4 simulator external standard solutions for her.
- 5 59. AMG informed EF that she would no longer be required to test simulator external
- 6 standard solutions and therefore EF would no longer be required to run tests for
- 7 AMG.
- 8 60. The testimony of EF and Mark Larson make it clear that this fact was relayed to
- 9 BKL when AMG and BKL first discussed the allegations of this complaint.
- 10 61. As AMG told ML, AMG told BKL this because it was the only thing she could
- 11 think of that was wrong.
- 12 62. When EF and AMG met to discuss the investigation of the March 15, 2007, "tip"
- 13 they intentionally decided not to reveal that EF was testing simulator external
- 14 standard solutions for AMG.
- 15 63. This was a conscious decision made by EF and AMG and it revealed their intent to
- 16 hide this fact from revelation.
- 17 64. EF and AMG then produced the April 11, 2007, interoffice communication
- 18 revealing the results of their investigation.
- 19 65. Both EF and AMG signed the April 11, 2007, interoffice communication.
- 20 66. Neither EF nor AMG admit drafting the April 11, 2007, interoffice communication.
- 21 67. ML's testimony indicated that AMG said that EF drafted the April 11, 2007,
- 22 interoffice communication.
- 23 68. EF's testimony, and the transcript of his interview with Sgt. Penry and Det. Moate,
- both with the WSP, indicates that AMG drafted the April 11, 2007, interoffice communication.
69. The evidence clearly established that the April 11, 2007, interoffice communication did not address the allegations of the complaint made on March 15, 2007. In fact, BKL admitted this in his testimony in Skagit County.
70. This April 11, 2007, interoffice communication was an attempt to hide the actions of AMG and EF.
71. BKL knew this and he did nothing to reveal the actions of EF and AMG.

- 1 72. After March 15, 2007, AMG stopped testing simulator external standard solutions at  
2 the direction of BKL. The only inference that can be drawn is that BKL knew that  
3 EF was testing simulator external standard solutions for AMG.
- 4 73. BKL knew, or should have known, that everyone who tested simulator solutions  
5 signed a BAC Verifier DataMaster 0.08 Simulator Solution Certifications, under  
6 penalty of perjury.
- 7 74. In March 2007, BKL knew that AMG was signing BAC Verifier DataMaster 0.08  
8 Simulator Solution Certifications, under penalty of perjury, which were false and  
9 misleading.
- 10 75. BKL, AMG and EF kept this wrongdoing quiet until after July 9, 2007.
- 11 76. On July 9, 2007, the WSP received a second "tip".
- 12 77. This "tip" said, "AMG doesn't really certify all those simulator solutions. If you  
13 look in the file you'll find a grammatagram with her name on it, but if you also  
14 check over the years of where she really was on the days that those things were  
15 certified you'll find once in a while she was in DC or Alaska, or somewhere else.  
16 She had somebody else do it and then she'll sign the forms that says, under penalty  
17 of perjury I analyzed this. If you don't think that's a big deal just think what  
18 Francisco Duarte would think of that."
- 19 78. On July 10, 2007, Deputy Chief Paul Beckley assigned this second "tip" to BKL for  
20 investigation.
- 21 79. BKL then revealed the actions of AMG and EF. This revelation led to a criminal  
22 investigation into the actions of AMG and EF.
- 23 80. The evidence clearly shows that AMG, EF and BKL engaged in an attempt to keep  
these activities from becoming know.
81. The Defendants have established that there was governmental misconduct and an  
attempt to cover up this governmental misconduct.
82. As MP testified during the Seattle Municipal Court evidentiary hearing, the signing  
of the BAC Verifier DataMaster 0.08 Simulator Solution Certifications is part of the  
certification process used in the Tox Lab.
83. The investigation into these allegations resulted in ML interviewing AMG.
84. ML testified about this interview and a copy of his notes of that interview was  
admitted into evidence.
85. AMT told ML that other people in the lab were not conducting their own tests.

86. To this day we do not know who else is falsifying their BAC Verifier DataMaster 0.08 Simulator Solution Certifications, under penalty of perjury.

87. The court finds that BKL was evasive and deceptive during his testimony.

88. The court finds that MP was evasive and deceptive during her testimony.

89. The court finds that EF was evasive and deceptive during his testimony.

90. The court finds that the evidence clearly shows that the analysts at the Tox Lab knew that AMG was falsely signing BAC Verifier DataMaster 0.08 Simulator Solution Certifications, under penalty of perjury.

91. The court finds that it is impossible to determine when AMG tested her own solutions.

92. The court finds that a properly certified simulator external standard solution must comply with the procedures created by BKL.

93. The court finds that it is impossible to determine compliance with the methods approved by BKL for any simulator external standard solution allegedly tested by AMG.

94. The court finds that the plaintiff cannot establish compliance with RCW 46.61.506 for any breath test which used a simulator external standard solution allegedly tested by AMG.

95. There were numerous errors made by the Tox Lab calling into question the quality of the work of the Tox Lab.

96. These errors are too numerous to list however they include; the signing certifications for simulator external standard solutions before the solutions were created; using software to perform calculations that was not working properly; signing certifications for simulator external standard solutions that contained misstatements; and worksheets that contained erroneous data.

### CONCLUSIONS OF LAW

1. CrRLJ 8.3(b) authorizes a trial court to dismiss any criminal prosecution in the furtherance of justice, and to ensure that an accused person is treated fairly.
2. A court may dismiss under CrRLJ 8.3 when the defendant shows: (1) governmental misconduct; and (2) prejudice affecting the defendant's rights to a fair trial. State v. Michielli, 132 Wn.2d 229 (1997).

- 1 3. The underlying purpose of CrRLJ 8.3(b) is fairness to the defendant. State v  
2 Stephans, 47 Wn. App. 600, 603 (1987).
- 3 4. The actions of the Tox Lab analysts, BKL, EF, MP and AMG amount to  
4 governmental misconduct.
- 5 5. The misconduct here is egregious and considered by the court to be the worst kind  
6 of governmental misconduct imaginable.
- 7 6. Where a state agent in a case against a criminal defendant has falsely declared  
8 under penalty of perjury that they faithfully administered their duties, as a  
9 predicate to securing admissible evidence at trial, then the resulting misconduct  
10 eviscerates the defendant's rights to due process and a fair trial. See, State v.  
11 Marks, 114 Wn.2d 724, 730, 790 P.2d 138 (1990).
- 12 7. The defendant's must also show that they have been prejudiced as a result of the  
13 governmental misconduct.
- 14 8. The sheer magnitude of the misconduct in this case leads this court to conclude  
15 that the defendants' have demonstrated actual prejudice.
- 16 9. The court is left in a difficult position. The testimony of the government's  
17 witnesses was so evasive and deceptive that the court does not believe them.  
18 Therefore, to rely upon those witnesses would be prejudicial to the defendants'  
19 rights to a fair trial.
- 20 10. CrRLJ 8.3(b) allows the court to dismiss under these circumstances.
- 21 11. However, the court may, in the alternative, suppress evidence if doing so would  
22 eliminate the prejudice and allow the defendants' to have a fair trial. (see State v.  
23 Busig, 119 Wn. App. 381(2003), where the court said, "Consequently, the  
officer's failure to include this information in the affidavit did not prejudice Ms.  
Busig and neither dismissal nor suppression of the evidence under CrR 8.3(b) was  
justified." Although the court did not dismiss or suppress it included suppression  
as one of the available remedies.)

1 12. When analyzing the remedies available under CrRJL 8.3(b) our Court of Appeals  
2 has held, "[a] court's decision under this rule is reviewed for abuse of discretion.  
3 State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). To support dismissal,  
4 a defendant must show arbitrary action or governmental misconduct. Id. at 239.  
5 Dismissal is not justified when suppression of evidence will eliminate whatever  
6 prejudice is caused by the action or misconduct. City of Seattle v. Orwick, 113  
7 Wn.2d 823, 831, 784 P.2d 161 (1989)." State v. McReynolds, 104 Wn. App. 560,  
8 17 P.3d 608 (2000).

9 13. In this particular set of cases suppression will eliminate the prejudice to the  
10 defendants'.

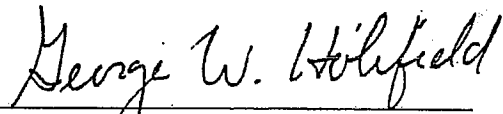
11 14. Therefore, it is the ruling of this court that the breath tests will be suppressed.

12 15. All breath tests conducted with simulator solutions allegedly tested by AMG are  
13 hereby suppressed.

14 **ORDER**

15 It is therefore ORDERED, ADJUDGED AND DECREED that the results of the  
16 Defendants' breath tests will be suppressed.

17 Dated this 11<sup>th</sup> day of March, 2008.

18 

19 The Hon. George W. Holifield